

## RETAIL PRICE COMPARISONS AND SAVINGS CLAIMS

*During the past few years we [The Attorney General's Consumer Protection Division] have noticed that the savings claims made in some retail advertising have become more and more far-fetched. In an effort to lure customers, some businesses have found it necessary to make increasingly unbelievable claims about the discounts and price reductions they offer consumers. As a result, the credibility of all advertising suffers. Consumers don't know what to believe so they become suspicious of all advertising claims.*

*A certain amount of "puffing" has always been tolerated as a normal part of advertising. "Puffing" is an expression of the advertiser's opinion about its product. It often contains exaggerations, but these are usually too general or too obviously incredible for any consumer to reasonably rely on these claims. While exaggerated statements of opinion may be acceptable puffing, exaggerated statements of fact are not. When statements of fact are false, misleading or deceptive, they are illegal*

*North Dakota's Consumer Fraud Law (N.D.C.C. 51-15) and False Advertising Law (N.D.C.C. 51-12) prohibit false advertising and false, misleading or deceptive claims in the sale of goods or services. The Consumer Protection Division is responsible for enforcing these laws and has been given the authority to publish rules which have the force and effect of law to carry out this responsibility.*

*False advertising laws and consumer fraud laws protect businesses and consumers alike. It is important that these laws be enforced so that consumers can rely on the integrity of the factual claims made by advertisers in their ads.*

*Otherwise, everybody loses. Consumers lose because the task of comparison shopping becomes much harder. Unable to rely on the truthfulness of advertising, they must gather information on their own or make buying decisions without the necessary information. Businesses lose because consumers begin to view all business as dishonest. And honest businesses are forced to compete unfairly with those businesses willing to tell the biggest lies about their products and prices.*

*These rules were effective on February 1, 1994, and were adopted to more clearly identify what kinds of price comparison advertising are misleading and deceptive. They are the result of a cooperative effort between the North Dakota Retailers Association and our office. A task force consisting of Association officers, retailers, and members of the Attorney General's staff worked together in an attempt to address all the concerns raised by comparative price advertising. We believe that the resulting rules will provide for a marketplace that is better for both the retailer and the consumer.*

*To aid businesses in better understanding these rules, we have prepared a brief commentary explaining each rule and giving examples of the conduct covered by them. The rules are printed in regular block type and the comments are in italics. The comments are not part of the rules. They do, however represent an interpretation of the rules by the agency in charge of*

*enforcing them. Where the comments use numbers or percentages not otherwise appearing in the rules, these are intended to aid in interpreting the flexible standards contained in the rules.*

### WHAT IS PRICE COMPARISON ADVERTISING?

*Price comparison advertising is any advertising that compares an advertiser's current selling price with some other price or measure of value or that makes a claim based on such a comparison. For example, a price comparison ad might say. "HALF-PRICE SALE",- "WAS \$7 -- NOW \$6",- or, 'ALL WHITE GOODS 20% OFF.'" The price comparisons in these examples are all with the sellers own former selling price. In the second example that price is stated in the ad. In the other two examples, the comparison with the former selling price is implied. Other types of price comparisons might be with a competitor's price, with a price recommended by the manufacturer, or even with a price that hasn't taken effect yet, as in a special introductory price offer.*

### WHAT DO THESE RULES COVER?

*The rules cover all price comparison statements made by a seller, no matter how they are made. For example, the rules apply to newspaper, television and radio advertisements. They also apply to in-store signs, price tags, point-of-sale displays, flyers, catalogs and even verbal statements made by sales people. Finally, the rules also apply to merchandise that has been pre-ticketed by the manufacturer.*

*Besides the provisions on price comparison advertising, the rules also cover the use of such terms as 'free," "sale" and "wholesale." While technically not price comparison advertising, these words are used for the same purpose, namely, to tell the consumer that the advertised goods are offered at a reduction from normal prices.*

### HOW DO THESE RULES AFFECT THE USE OF PRICE COMPARISONS?

*These rules do not prohibit price comparison advertising. Advertisers remain free to compare their prices with any honest price. The rules only prohibit comparison price advertising that is false, deceptive or misleading. They provide you with different ways for you to meet your obligation to substantiate the price comparison claims you may choose to make. By honestly following these rules, you can be assured that your price comparison advertising will not be misleading or deceptive.*

*If you have any questions, comments or concerns about these rules, please give us  
a call. We are:*

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## THE RULES

**10-15-01-01 - Definitions.** All words used in this chapter which are defined in North Dakota Century Code chapter 51-15 have the meanings given in that chapter. As used in this chapter:

1. "Advertisement" includes statements and representations contained on any label, tag, or sign attached to, printed on, or accompanying merchandise offered for sale or printed in a catalog or any other sales literature.
2. "Clearly and conspicuously" means that the statement, representation, or term being disclosed is reasonably understandable, is in such size, color contrast, or audibility, and is so placed and presented as to be readily noticeable, and is in close proximity to the information it modifies.
3. "Comparable merchandise" means merchandise that is substantially similar in composition, style, design, model, kind, variety, service, or performance characteristics to the merchandise to which it is compared in any advertisement.
4. "Comparative price" means the price or other description of value of merchandise to which a seller compares its current price in any advertisement.
5. "List price" means a price given to a retailer by a manufacturer or other supplier as a suggested retail price for the merchandise and includes the term "manufacturer's suggested retail price".
6. "Price comparison" means an expressed or implied comparison in any advertisement (whether or not expressed wholly or in part in dollars, cents, fractions or percentages) of a seller's current price for merchandise with any other price or statement of value, whether or not the price is actually stated in the advertisement.
7. "Seller" means any person who offers any merchandise for sale at any location and who disseminates advertisements for that product in North Dakota. Seller may include any officer, agent, employee, sales person, or representative of the seller, and any advertising agency employed by a seller.
8. "Trade area" means the geographic area where the seller's outlets are located or where the seller's advertisements are disseminated.

**Comments:**

*This section defines words used frequently in these rules. Remember, when we talk about ads, we don't just mean radio, TV and newspaper ads. We mean fliers, catalogs, brochures, in-store displays, price tags, and any other labels or signs that contain information about your products and prices.*

**10-15-01-02 - Identifying basis of price comparison.** It is a deceptive act or practice for a seller to make a price comparison or claim a savings as to any merchandise offered for sale unless the seller clearly and conspicuously discloses the basis for or source of the price comparison or savings claim. However, a seller may make a price comparison or claim a savings without the required disclosure if the price comparison or savings claim is based on the seller's own former price as described in section 10-15-01-03. Terms such as "regular", "regularly", "formerly", "originally", "was", or words of similar meaning may be used by the seller to identify the seller's own former price.

**Comments:**

*Unless your savings claims or price comparisons are based on your own former prices, you must explain the basis of any savings claim or price comparison you make in your ads. For example, both of these ads comply with this rule:*

**SALE - SAVE \$ 1 0!!**

Acme's Price: \$29.99

Our Price: \$19.99

*This ad explains that the \$10 savings claim is based on a comparison to Acme's price.*

**SALE**

All Merchandise reduced 33%!!

*This ad doesn't need any explanation because it is clear that the 33% reduction is from the seller's own former price.*

**10-15-01-03 - Comparison to seller's own former price.** It is a deceptive act or practice for a seller to compare the seller's current price with the seller's former price for any merchandise unless:

- 1 . The former price is a price at which a substantial number of sales were made by the seller during the three months immediately preceding the price comparison;
2. The former price is a price at which a substantial number of sales were made by the seller and the seller clearly and conspicuously discloses the dates during which a substantial number of sales were made by the seller at the former price;

3. The former price is a price at which the seller offered the merchandise for a reasonably substantial period of time in the recent, regular course of its business, openly, actively, and in good faith, with an intent to sell the merchandise at that price.

### **Comments:**

*This rule gives you three alternatives for supporting savings claims or price comparisons that are based upon your own former prices. You may make claims or comparisons based upon your own former prices if you can show that you either --*

- *Sold a substantial number of goods at your former price during the three months before your ad.*
- OR-**
- *Sold a substantial number of goods at your former price but during some other period than the three months before the ad and have identified that period in the ad.*
- OR-**
- *Made an honest and realistic effort over a reasonably substantial period to sell goods at that price. In other words, you weren't just marking your goods up to an unrealistically high "promotional" price so you could later advertise an exaggerated mark down.*

*We purposely used the words "substantial" and "reasonably substantial" in the rules to allow you some flexibility in supporting your savings claims or price comparisons. You must be able to establish that your former price is "real" and not exaggerated. We understand that what is necessary to establish this will vary depending upon each seller's circumstances. What is substantial for one seller may not be for another. For example, three sales of a \$1,000 sofa may say as much about the reality of that price as 100 sales of a \$15 wall mirror or a \$50 computer software package. Three sales may be a substantial number for a small seller but may be insubstantial for a larger one.*

*An important factor that we will consider is the proportion of your total sales that are made at the advertised former price. If you are making over half your sales at a price advertised as your "regular price," you shouldn't have any trouble showing that the advertised regular price is, in fact, your regular price. On the other hand, if sales at your advertised "regular price" make up less than 25% of your total sales, you may find it hard to support your claim that this price is really your regular price.*

*If you fail to make substantial sales at your former price, the absence of sales raises the question of whether it was realistic to expect substantial sales at the former price. In that case, you will need to be able to show that you were making an honest and realistic effort to sell the goods at the former price. This can be done by showing that you offered the goods for a "reasonably substantial period of time" at a price realistically intended to actually sell the goods and not just to establish an inflated comparison price.*

*What is a "reasonably substantial period of time" will depend on the normal selling patterns in your industry or in your particular business. Goods that are offered at a former price for more than half the typical selling period for those goods will almost certainly meet the reasonably substantial standard. Goods that are offered for less than a quarter of the typical selling period will almost certainly not meet that standard.*

*An important factor in determining whether your former price was realistic is how it compares with your average retail mark up on the goods you do sell. If your goods sell, on average, at a 50% markup over cost, it is probably unrealistic to expect substantial sales of similar goods at a price based upon a 100% markup.*

*Example:*

**SALE**

Regularly : \$29.99

Sale Price: \$19.99

*This price tag is permitted as long as you can support the claim that \$29.99 was your regular price. You can do that by showing that either --*

- *You had substantial sales of this item at \$29.99 during the three months before it went on sale.*
- OR-**
- *You offered it for sale at \$29.99 for a reasonably substantial period before the sale in an honest and realistic effort to sell the item.*

*Substantial sales in some other period will not support the claim in this ad because the tag does not disclose a different selling period.*

**10-15-01-04 - Comparison to seller's future prices.** It is a deceptive act or practice for a seller to make an introductory offer or to compare its current price for merchandise with the price at which the merchandise will be offered in the future, unless:

- 1 . The future price takes effect within a reasonable time after the introductory offer or price comparison is published; and
2. The future price of the merchandise is, subsequent to the end of the introductory sale, properly established as the seller's regular and customary price.

## Comments:

*Sometimes you may want to use ads that compare your current prices with a price you plan on charging at some time in the future. For example, you may want to run an introductory offer on some new products or the manufacturer may have announced a wholesale price increase that you intend to pass on to consumers after you sell out your existing stock.*

*Under this rule, it is okay to compare your current price with your future price as long as both of the following conditions are met --*

- The advertised future price actually takes effect within a reasonable time.*
- AND-*
- When it does take effect, the future price becomes your regular and customary price.*

*Unless there are special circumstances, a reasonable time is probably not more than 90 days.*

*Example: \$10 OFF!! INTRODUCTORY PRICE - \$19.99.*

*To back up this ad, you need to be able to show that your regular price for this product actually became \$29.99 within a relatively short time after this ad appeared. Phrases such as "Introductory Offer," "Advance Sale," "Pre-season Sale.." and "Will Be" alert your customers to the temporary nature of this low price offer.*

*Be careful that you don't confuse consumers when you advertise an introductory price on the price tag. Normally, when a price tag has two prices on it, consumers will assume that the higher price is the old price. But that is not the case with introductory offers. You will want to make it clear that the higher price is the new one, that is, the one about to go into effect.*

**10-15-01-05 - Range of savings or price comparison claims.** It is a deceptive act or practice for a seller to state or imply that any merchandise is being offered for sale at a range of prices, or at a range of percentage or fractional discounts, unless the highest price or the lowest discount in the range is clearly and conspicuously disclosed in the advertisement and a reasonable number of the items in the advertisement are offered with the largest advertised discount or the lowest advertised price. If at least five percent of the items in the advertisement are offered with the largest advertised discount or the lowest advertised price, a rebuttable presumption exists that a reasonable number were offered with at least the largest advertised discount or the lowest advertised price.

## Comments:

*Any time you advertise a range of savings, as in "ALL BEDROOM FURNITURE 10% to 25% OFF!," you must show both ends of the range in your ad. You can't just show the largest savings*

available. In addition, you may not exaggerate the savings by offering the biggest discount on only a tiny fraction of sale items. The largest discounts must apply to a reasonable number of the sale items.

The rule assumes that a reasonable number of items is at least 5% of the items on sale. In other words if you offer at least 5% of the sale items at the largest discount in the range, you don't have to worry about proving that the discount applies to a reasonable number. If we disagree and think that more than 5% is necessary to be a reasonable number, it would be up to us to prove it. On the other hand, you are still free to show that some number less than 5% of the sale items is a reasonable number.

Example:

**(CORRECT)**

**SALE**

"Save from 10% to 50% off"

"Save \$9 to \$29"

**(INCORRECT)**

**SALE**

"Save up to 50% off"

"Savings as much as \$100"

The two examples labeled as incorrect fail to show the low end of the range of savings or discounts offered in the sale. The correct examples are correct as long as you are offering at least 5% of the sale merchandise at 50% off, in the first example, and at a \$29 savings in the second example.

**10-15-01-06 - Use of list price or similar comparisons.** It is a deceptive act or practice for a seller to make a price comparison or to claim a savings, expressed or implied, from a list price or term of similar meaning, unless:

- 1 . The list price does not exceed the highest price at which substantial sales of the merchandise have been made in the seller's trade area;
2. The list price is the price at which the seller offered the merchandise for a reasonably substantial period of time in the recent, regular course of its business, openly, actively, and in good faith, with an intent to sell the merchandise at that price;
3. The list price does not exceed the highest price at which the product is offered by a reasonable number of sellers in the seller's trade area for a reasonably substantial period of time in the recent, regular course of business; or
4. The list price does not exceed the seller's cost plus the percentage markup regularly used by the seller in the actual sale of such merchandise or merchandise of a similar class or kind, in the seller's recent, regular course of business.

## Comments:

*The problem with comparisons to a manufacturer's suggested price or to a list price is that most consumers tend to lump list prices in with all other types of price comparison. As a result, price comparisons with phony list prices are every bit as misleading as comparisons with phony regular prices. These rules don't prevent you from using comparisons to list price in your ads. But as with all price comparisons, if you use them you must be able to show that the list price is a real price. You can't avoid responsibility for using a phony price just because it was the manufacturer's idea.*

*You can substantiate a list price in any one of four possible ways. List price comparisons comply with the rule if you can show that either --*

- *The list price is the same as or lower than the highest price at which substantial sales have been made in your trade area.*
- OR-**
- *The list price is the price at which you have offered the goods for sale for a reasonably substantial period. This is the same requirement as in subsection 3 of the rule regarding use of your own former price. (N.D.A.C. § 10-15-01-03).*
- OR-**
- *The list price is equal to or less than the price at which the same goods are currently being offered by a reasonable number of sellers in your trade area. This means that the goods must be offered by more than one or two isolated sellers and for at least 60-90 days.*
- OR-**
- *The list price does not exceed the price you would charge if you applied your usual markup to your cost of the product.*

**Example:      ABC Department Store Men's Wear Department**

Men's Wool Blend Slacks  
Manufacturer's List Price \$74.99  
ABC sale price                \$39.99

*Here, ABC can compare its sale price with the Manufacturer's List Price as long as it can show that either--*

- *A substantial number of the slacks have been sold in the area for \$ 74.99 or more.*
- OR-**
- *A reasonable number of area seller's are currently offering them at a price of \$74.99 or more.*
- OR-**
- *ABC has offered them for sale at \$74.99 for a reasonably substantial period in an honest and realistic effort to sell them at that price.*

*If ABC cannot show any of the above to be true, it may still compare its sale price with the list price but only if its cost plus normal retail markup equals at least \$74.99.*

Example:	ABC cost	\$25.00
	ABC normal markup	50%,

*In this example, ABC cannot compare its sale price to the list price. This is because cost plus 50% markup would only be \$50.00, not \$ 74.99.*

**10-15-01-07 - Comparison to competitor's price.** It is a deceptive act or practice for a seller to compare the seller's price with a price currently being offered by another seller for merchandise unless the merchandise is comparable merchandise and the comparative price is at or below the price at which the comparable merchandise is currently being offered in the seller's trade area by a reasonable number of other sellers in the same trade area, or another identifiable seller.

### **Comments:**

*If you compare your prices with those of the competition, you must either--*

- *Identify the specific competitor in your ad.*
- OR-**
- *Be able to show that a reasonable number of area competitors are offering the product at the advertised comparison price.*

*In addition, in either case the product must be of comparable quality, grade, material, and craftsmanship. Private label and generic brand items are generally not considered comparable to name brand items. Therefore, if you make a price comparison between a private label or generic brand item and a name brand item, you must make it clear that the comparison is between name brand and non-name brand items.*

*Examples:*

"Slacks \$21.99; Compare at \$29.99."

*This ad is okay if the slacks are comparable in quality, grade, material and craftsmanship, and a reasonable number of area sellers charge at least \$29.99. Otherwise, this ad is deceptive.*

"House Brand Suits - \$99; Equal to \$159 Name Brand Suits Sold Elsewhere."

*This ad complies with the rule if the suits are comparable and if a reasonable number of sellers charge at least \$159 for the name brand suits. Of course, in a real ad, the advertiser would use the name of its particular house brand as well as the actual brand names sold elsewhere.*

"Our Price \$69; Compare at Jones Hardware, \$99."

*Products must be comparable but only Jones Hardware needs to currently be charging \$99.*

**10-15-01-08 - Bargain offers based on the purchase of other merchandise and use of the word free.** It is a deceptive act or practice to use the word free, or words of similar meaning, or to represent bargain offers, including "buy one - get one free", "buy one - get one at half-price", "two for one", and "one cent sale", when describing merchandise to be given to a customer who purchases other merchandise, if the seller recovers, in whole or in part, the cost of the free or bargain merchandise by marking up the price of the item which must be purchased, by substituting an inferior item or service, or otherwise. It is a deceptive act or practice to represent that other merchandise is being offered free or at a bargain price with the sale if the advertised merchandise can be purchased from the advertiser at a lesser price without the free or bargain merchandise, particularly if the merchandise is usually sold at a price arrived at through bargaining.

### **Comments:**

*So-called free merchandise offers are another problem area which these rules address. If you advertise an item as free, it must be available to the consumer at no extra cost, whether that cost is in dollars or in a reduction in quality or service.*

*Moreover, the word "free" loses its meaning in cases where the selling price of the product is usually negotiated. This is because there is no way of knowing whether the seller would have negotiated a different price if the "free" item wasn't included. The language of this rule is drawn from the Federal Trade Commission's "Guide concerning the use of the word 'free' and similar representations.*

*Example:*

"Buy one suit - Get one free \$399"

*Whether this ad is deceptive depends on the several underlying facts. The ad is deceptive if --*

- *The regular selling price of a single suit is less than \$399.*  
**-OR-**
- *The store regularly offers a free shirt and tie or free alterations with each suit purchased and the Buy One-Get One Free offer doesn't include the extra merchandise or service.*  
**-OR-**
- *The consumer can buy the suit for \$299 if he or she gives up the "free" suit.*  
**-OR-**
- *These suits regularly sell for as low as \$299 or for as much as \$449, depending on the bargaining ability of the customer.*

**10-15-01-09 - Use of sale terminology.** It is a deceptive act or practice for a seller to use terms such as "sale", "sale prices", "now only \$\_\_\_\_", or other words and phrases that imply a price savings unless the price of the merchandise is reduced by a reasonable amount from the former price of the merchandise. If the seller reduces the price by five percent or more from the former price, a rebuttable presumption exists that the price reduction was of a reasonable amount. However, the term "sale" may be used in an advertisement where not all items are offered at a reduction from regular price if the items are clearly and conspicuously identified.

### **Comments:**

*You may not advertise a "sale" or use words that mean the same thing unless you have made reasonable reductions from the regular selling price of your sale merchandise. What is a reasonable reduction will depend on the profit margins typical in your industry.*

*The rule provides that a reduction of 5% is to be considered reasonable unless we can prove otherwise. If you advertise a sale based on price reductions of less than 5%, you will need to show why a smaller reduction is reasonable in your case.*

*Of course, these reductions must be based on authentic regular prices and not phony ones. You may also have a sale that doesn't include all of the goods in your store, but only if you make that limitation clear in your ad.*

*Example:*

## **TV & VCR SALE!**

**10% Off All TV's!      Special Group of VCR's 20% Off!**

Other merchandise at regular prices

*This ad complies with the rule as long as –*

- *all television sets are available at 10% off;*
- *a reasonable number of VCR's are available at 20% off; and*
- *both discounts are based on the actual regular selling prices.*

*Note that the ad makes it clear that only the TVs and VCRs are on sale.*

**10-15-01-10 - Use of term wholesale.** It is a deceptive act or practice for a seller to use the term "wholesale" or words of similar meaning in connection with any merchandise offered for sale at retail.

### **Comments:**

*Wholesale means "to sell in quantity for resale." Thus, "wholesale prices" are the prices at which goods are sold in quantity for resale. You may only use the word wholesale to refer to sales in quantity for resale. Any other use is deceptive.*

**10-15-01-11 - Reporting.** Within twenty-one days after receipt of a written request from the attorney general, persons making price comparisons shall submit a report in writing setting forth substantiating information upon which the price comparison was based. The attorney general, for cause shown, may grant additional time to respond upon request.

### **Comments:**

*Any advertiser may be called upon to substantiate the claims made in its advertising. If you choose to use comparison price advertising, you should be prepared to provide us with the information upon which the comparisons are based within 21 days after we request it. If you ask for a longer period and have a good reason, we will give you more time.*